No. 1[redacted]163

IN THE

Supreme Court of the United States

ANTHONY ORLANDO

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reply Brief for Petitioner

IN THE

Supreme Court of the United States

October Term, 1963

No. 1198

ANTHONY ORLANDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reply Brief For Petitioner

May it Please the Court:

In *Sanders v. United States*, 373 U.S. 1, 22, your Honors commended to the authorities concerned, the general advisability of "the imaginative handling of a prisoner's brief motion." The writer of the government's brief has apparently attempted to avail himself of the privilege of "imaginative handling" in quite a different context.

The government's brief in opposition does not answer the contentions made within our petition for certiorari. Rather, the brief in opposition is an evasion of the issues that we presented to your Honors.

The government contends that the denial of Petitioner's first motion in the District Court, was "on the merits." (Brief in Opposition, p. 6). That is apparently an attempt to show that your Honors' opinion in *Sanders v. United States*, 373 U.S. 1, does not control the case at bar.

We suppose that it is possible to contend that any determination is made "on the merits" in the sense that it represents an attempt to do what seems to be right. But if a decision on the merits means an attempt to find the intrinsic rights and wrongs of the relationship between Petitioner and the government, as determined by matters of substance rather than by matters of form, it is quite certain that neither of Petitioner's motions have been decided "on the merits".

In *Sanders*, your Honors held that a decision on the merits "means that if factual issues raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved those issues an evidentiary hearing was held". 373 U.S. 16.

No evidentiary hearing was held. Petitioner swore that he had been promised a maximum sentence of fifteen years. The District Court looked only to "the record, including a transcript of the arraignment and sentence". (A. 3a). Sure enough, the records did not show that any such promise had been made. Therefore the motion was denied.

We are astounded that the government would feel free

From that auspicious beginning, the government proceeds to argue that the Petitioner is quite unreliable. The relevance of that assertion is unclear at best. Logicians would refer to such an argument as "well-poisoning". A lawyer must content himself with calling that presentation not merely irrelevant, but also totally unwarranted. The supposed indicia of Petitioner's unreliability cited by the government, may indeed demonstrate unreliability, but not on the part of the Petitioner.

The government contends that Petitioner's "attempt to avoid an adjudication of guilt on the conspiracy count" "would have been completely meaningless if he believed that he had a guarantee of a fifteen year sentence." Brief in Opposition, p. 7). But it would not have been the least bit meaningless if Petitioner had been considering as he probably was, the effect of this adjudication on his co-defendants and the fact that the conviction of an additional crime would necessarily affect his chances before the parole board.

The government also contends that Petitioner is unreliable because he claims that witnesses will support his story. That startling assertion is predicated on the government's contention that the existence of witnesses "contradicts" with Petitioner's supposed "basic factual contention that a deal was *precluded* made between his attorney and counsel for the government." (Emphasis added, Brief p. 7). We are reluctantly compelled to advise your Honors that the record will not support the government's assertion. Nowhere in the record does Petitioner refer to a "precluded" arrangement. There simply is no such imagined factual claim that claimed by the government.

Finally, the government contends that the delay of three and one-half years prior to Petitioner's first motion "would hardly have been tolerable if Petitioner's version of the facts were at all truthful." On the contrary: It was only after a delay of three and one-half years that the difference between a fifteen years sentence and a twenty-five year sentence began to have any real meaning to the petitioner. Prior to his first motion, Petitioner could not have been considered for parole whether his sentence had been fifteen years or twenty five. Moreover, there is no intimation that the Petitioner had the knowledge or the resources with which to present his motion during the 3½-year delay in which the government finds such sinister inferences. It is not unknown that the government has delayed action for longer periods of time and with less justification in circumstance.

* * *

The government can exhaust the lexicon of epithet in its characterizations of the Petitioner without affecting in any degree the merits of this case. All the language in the world has not the eloquence of the bald fact that Petitioner has formally alleged that if asked, his lawyer and the prosecutor who handled his case for the government will admit that Petitioner had a "deal" for a fifteen-year sentence—and nobody has been willing even to ask the prosecutor, or Petitioner's lawyer, or anyone else whether this is true. On these unconscionable facts, the government has seen fit to assert in this court that Petitioner's contention was decided "on the merits."

The situation is literally intolerable. We pray that your Honors will not deem it worthy of further tolerance.